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Mature Land Sdn Bhd v Atlantic Plantation Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–736 OF 2010
SYED AHMAD HELMY, MAH WENG KWAI JJCA AND DAVID WONG J
10 OCTOBER 2012

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Land Law — Vacant possession — Claim for — Parties entered sales and purchase agreement to purchase estate — Vacant possession of estate to be delivered when purchase price fully-paid — Illegal occupiers on estate — Claim for loss and damage due to breach of agreement — Specific performance of delivery of vacant possession — Whether vacant possession delivered — Whether loss and damage suffered as result of non-delivery of vacant possession — Appeal against decision of High Court

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The appellant/defendant and the respondent/plaintiff had entered into a sales and purchase agreement ('SPA') to purchase 500.13 acres of oil palm plantation land ('estate') which was held under one issue document of title at the price of RM5,501,430. Pursuant to cl 5 of the SPA, when the purchase price was fully-paid, vacant possession of the estate was to be delivered to the respondent. Ten months later, the appellant received a notice from the respondent's solicitor that there were illegal occupiers on part of the estate and allegation that vacant possession had not been fully handed over. Another notice of demand for the delivery of vacant possession of the estate was later issued, demanding for an immediate eviction of the illegal occupiers. The respondent also claimed for loss and damage suffered as a result of the breach of the SPA. In the High Court, it was held that the appellant had failed to deliver vacant possession of the whole of the estate to the respondent. The learned judicial commissioner (JC) computed the respondent's loss and damage as a result of the non-delivery of vacant possession of the said portion of land to be in the sum of RM565,686.44 and assessed the agreed liquidated damages to be in the sum of RM65,893.14. The learned JC refused to grant specific performance as it was held that it would be too onerous on the defendant to order that the defendant deliver vacant possession of the remaining 51.37 acres of the said land as the illegal occupiers' problem was too long outstanding and the illegal occupiers seemed very stubborn and even if the defendant could obtain the necessary court order which the defendant had already obtained earlier, it would be very difficult for the defendant to enforce the court order in the light of the tough and aggressive stance adopted by the illegal occupiers. The appellant was ordered to refund the sum of RM565,686.44 with interest to the respondent and that upon a full refund of the said sum and payment of interest, ownership of the said portion of land would revert to the appellant. The learned JC did not

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order any payment for loss of income to the respondent on the ground that the respondent had failed to adduce evidence to show and/or prove the loss/damage nor the amount of the loss/damage suffered by the respondent. Dissatisfied, the appellant appealed to the present court against the decision of the court below.

Held, allowing the appeal with costs of RM30,000:

(1) The respondent's main claim was for the specific performance of delivery of vacant possession of the said portion of land alleged to be illegally occupied. There was no claim based on a rescission or termination of the SPA and particularly, there was no plea made by the respondent for a refund of the value of the said portion of land at RM565,686.44 or that upon a refund of the said sum by the appellant, ownership of the said portion of land (51.37 acres) would revert to the appellant. It was trite that the court could not entertain or grant any relief not prayed for by the respondent (see para 17).

(2) It was an undisputed fact that the entire estate was comprised under one issue document of title and there was no provision for the estate to be severed and subdivided and for ownership of the said portion of land to be reverted to the appellant. The claim for severance, sub-division and reversion was never pleaded and prayed for by the respondent in the first place. The learned JC failed to appreciate that the SPA was in respect of the entire estate and that there was no provision in the SPA to cater for a situation such as this by way of severance and sub-division. It was not just a matter of the costs of the application for subdivision that was in issue. In any event, even in the order of the learned JC, no order for sub-division was made and no directions given as to how the sub-division and reversion were to take place to give effect to the order of the court. The court had to be mindful of the terms and conditions embodied in the SPA and the intentions of the parties and it was not for the court to attempt to rewrite the terms and conditions of the SPA for the parties (see para 18).

(3) Vacant possession of the whole estate had in fact and in law been handed over by the appellant to the respondent. The decision of the learned JC that vacant possession of the said portion of land had not been delivered to the respondent went against the weight of the evidence. There were manifest errors of fact and law in the decision of the trial court. As such, there was no issue of whether an order of specific performance, which in any event was an equitable remedy, ought to have been granted to the respondent (see para 19).

(4) Since the appellant was not liable for any breach of the SPA, the other claims by the respondent for loss and damage did not arise. The order of the High Court providing for the appellant to refund the purchase price

of the said portion of land to the respondent and for the respondent to revert ownership of the 51.37 acres of the estate to the appellant was accordingly set aside (see paras 21–22).

[Bahasa Malaysia summary

Perayu/defendan dan responden/plaintif telah memeterai perjanjian jual beli ('PJB') untuk membeli 500,13 ekar tanah ladang kelapa sawit ('hartanah') yang telah dipegang di bawah satu isu dokumen hak milik pada harga RM5,501430. Menurut klausa 5 PJB, apabila harga pembelian telah dibayar sepenuhnya, milikan kosong hartanah tersebut akan diserahkan kepada responden. Sepuluh bulan kemudian, perayu menerima notis daripada peguam responden bahawa terdapat penghuni haram di sebahagian daripada harta pusaka dan dakwaan bahawa milikan kosong telah tidak sepenuhnya diserahkan. Satu lagi notis tuntutan untuk penyerahan milikan kosong harta tersebut kemudiannya dikeluarkan, menuntut bagi pengusiran penghuni haram dengan segera. Responden juga mendakwa bagi kerugian dan kerosakan yang ditanggung akibat daripada pelanggaran PJB. Di Mahkamah Tinggi, diputuskan bahawa perayu telah gagal menyerahkan milikan kosong seluruh harta kepada responden. Pesuruhjaya kehakiman yang bijaksana ('PK') menaksir kerugian responden dan kerosakan akibat daripada ketidakserahan milikan kosong bagi sebahagian daripada tanah berada dalam jumlah RM565,686,44 dan menilai ganti rugi pada jumlah yang dipersetujui sebanyak RM65,893.14. PK yang bijaksana enggan memberikan pelaksanaan spesifik kerana telah diputuskan bahawa ia akan terlalu membebankan defendan untuk memerintahkan agar defendan menyerahkan milikan kosong baki 51.37 ekar tanah tersebut kerana masalah penghuni haram terlalu lama tertunggak dan penghuni haram seolah-olah sangat degil dan walaupun defendan boleh mendapatkan perintah mahkamah yang perlu yang mana defendan telah diperolehi sebelum ini, akan menjadi sangat sukar buat defendan untuk menguatkuasakan perintah mahkamah memandangkan pendirian tegas dan agresif oleh penghuni haram. Perayu telah diarahkan untuk membayar balik jumlah RM565, 686,44 dengan faedah kepada responden dan bahawa dengan bayaran balik jumlah tersebut dan pembayaran faedah, milikan bahagian tanah tersebut akan dikembalikan kepada perayu. PK tidak memerintahkan sebarang bayaran bagi kerugian pendapatan kepada responden atas alasan bahawa responden gagal mengemukakan bukti yang menunjukkan dan/atau membuktikan kehilangan/kerosakan atau jumlah kehilangan/kerosakan yang dialami oleh responden. Tidak berpuas hati, perayu merayu kepada mahkamah ini terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM30,000:

(1) Tuntutan utama responden adalah bagi pelaksanaan spesifik penyerahan milikan kosong bahagian tanah tersebut yang didakwa dihuni secara haram. Tiada tuntutan berdasarkan pembatalan atau penamatan PJB dan

khususnya, tiada rayuan dibuat oleh responden untuk pembayaran balik daripada nilai sebahagian tanah berjumlah RM565,686,44 tersebut atau bahawa apabila bayaran balik jumlah tersebut oleh perayu, milikan bahagian tanah tersebut (51,37 ekar) akan dikembalikan kepada perayu. Adalah tidak dipertikaikan bahawa mahkamah tidak boleh melayan atau memberikan apa-apa relief yang tidak dipohon oleh responden (lihat perenggan 17).

(2) Adalah fakta yang tidak dipertikaikan bahawa keseluruhan harta tersebut adalah di bawah satu isu dokumen hakmilik dan tidak ada peruntukan untuk hartanah yang akan diputuskan dan dibahagikan dan milikan bahagian tanah tersebut dikembalikan kepada perayu. Tuntutan pemutusan, pembahagian dan pengembalian tidak pernah diplidkan dan dipohon oleh responden pada asalnya. PK gagal mempertimbangkan bahawa PJB adalah mengenai keseluruhan harta pusaka dan bahawa tidak ada peruntukan dalam PJB bagi situasi seperti ini, melalui cara pemutusan dan pembahagian. Bukan hanya perkara kos permohonan untuk pecah bahagi yang menjadi isu. Dalam apa jua keadaan, walaupun dengan perintah PK, tiada perintah bagi pembahagian telah dibuat dan tiada arahan yang diberikan tentang bagaimana pembahagian dan pengembalian telah berlaku untuk memberi kesan kepada perintah mahkamah. Mahkamah harus prihatin terhadap terma dan syarat yang terkandung dalam PJB dan niat pihak-pihak dan ia bukan untuk mahkamah untuk cuba merangka semula terma-terma dan syarat-syarat PJB bagi pihak-pihak (lihat perenggan 18).

(3) Milikan kosong keseluruhan hartanah pada fakta dan dalam undang-undang telah diserahkan oleh perayu kepada responden. Keputusan PK bahawa milikan kosong bahagian tanah tersebut tidak dihantar kepada responden adalah menentang beban bukti. Terdapat kesilapan fakta dan undang-undang yang nyata dalam keputusan mahkamah perbicaraan. Oleh itu, tidak timbul isu sama ada suatu perintah pelaksanaan spesifik, yang dalam apa jua keadaan adalah remedi yang saksama, yang sepatutnya telah diberikan kepada responden (lihat perenggan 19).

(4) Oleh kerana perayu tidak bertanggungjawab bagi pelanggaran PJB, tuntutan lain oleh responden bagi kerugian dan kerosakan tidak timbul. Perintah Mahkamah Tinggi agar perayu membayar balik harga belian bahagian tanah tersebut ke atas responden dan agar responden mengembalikan milikan 51.37 ekar hartanah tersebut kepada perayu sewajarnya diketepikan (lihat perenggan 21–22).]

Notes

For cases on claim for, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5553–5556.

Cases referred to

Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals [2009] 6 MLJ 839; [2009] 6 CLJ 22, CA (refd)

Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals [2013] 2 MLJ 174, CA (refd)

Seven Seas Supply Co v Rajoo [1966] 1 MLJ 71, FC (refd)

Superintendent of Lands and Surveys Department Bintulu Division & Anor v Agi ak Bungkong & Ors [2012] 1 MLJ 335, CA (refd)

Topfell Ltd v Galley Properties Ltd [1979] 1 WLR 446, Ch D (refd)

Legislation referred to

Rules of the High Court 1980 O 89

Appeal from: Civil Suit No S22–28 of 2005 (High Court, Sandakan)

Jeyan Marimuthu (Ratni Dewi Hamdan with him) (MF Poon, Hiew & Associates) for the appellant.

Joey Wong (J Wong & Associates) for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] By a sales and purchase agreement ('SPA') entered into on 15 July 2004, the appellant/defendant agreed to sell and the respondent/plaintiff agreed to purchase 500.13 acres of oil palm plantation land ('estate') situated in Koyah, District of Kinabatangan, Sabah at the price of RM5,501,430. The land is held under one issue document of title.

[2] The completion date of the SPA was scheduled for 15 October 2004. Pursuant to cl 5 of the SPA, the appellant was to deliver vacant possession of the estate to the respondent within one day from the date of full payment of the purchase price.

[3] It was an agreed fact that the purchase price was fully paid on 8 October 2004 and that possession of the estate was delivered to the respondent on 9 October 2004.

[4] However, some ten months later on 16 August 2005, the solicitors for the respondent gave notice in writing to the appellant that there were illegal occupiers on part of the estate and alleged that vacant possession had not been fully handed over to the respondent. On 5 November 2005, the solicitors for

the respondent again issued a notice of demand to the appellant for the delivery of vacant possession of the estate by demanding for an immediate eviction of the illegal occupiers and claimed for loss and damage suffered as a result of the breach of the SPA.

THE RESPONDENT/PLAINTIFF'S CLAIM

[5] By its statement of claim the respondent claimed, inter alia, for:

(a) loss of income in the sum of RM100,219 as at September 2005 and continuing until the date of delivery of vacant possession;

(b) interest on the sum in para (a) at the rate of 8%pa from 1 October 2005 to the date of full payment;

(c) agreed liquidated damages in the sum of RM636,683.75 as at 5 December 2005 at the rate of 10%pa on the purchase price of RM5,501,430 calculated from 9 October 2004 until the date of delivery of vacant possession; and

(d) specific performance of the SPA.

AGREED ISSUES TO BE DETERMINED AT TRIAL

[6] The main issues agreed to be determined by the court at trial were whether the appellant had delivered vacant possession of the whole of the estate to the respondent on 9 October 2004 and whether the respondent had suffered any loss and damage arising from the alleged non-delivery of vacant possession of the whole of the estate.

[7] The area in dispute alleged by the respondent to be illegally occupied measured approximately 51.37 acres ('the said portion of land') that is, about 10% of the whole area of 500.13 acres sold to the respondent.

DECISION OF THE HIGH COURT

[8] After a full trial lasting three days the learned judicial commissioner ('JC') held that the appellant had failed to deliver vacant possession of the whole of the estate to the respondent. The learned JC computed the respondent's loss and damage as a result of the non-delivery of vacant possession of the said portion of land to be in the sum of RM565,686.44 and assessed the agreed liquidated damages to be in the sum of RM65,893.14 as at 5 December 2005.

[9] The learned JC refused to grant specific performance as prayed for by the

respondent 'for the reason that it will be too onerous on the defendant to order that the defendant deliver vacant possession of the remaining 51.37 acres of the said land as the illegal occupiers' problem is too long outstanding and the illegal occupiers seemed very stubborn and even if the defendant can obtain the necessary court order which the defendant had already obtained earlier, it would be very difficult for the defendant to enforce the court order in the light of the tough and aggressive stance adopted by the illegal occupiers'.

[10] In lieu of specific performance, the learned JC ordered the appellant to refund the sum of RM565,686.44 (being the value of the said portion of land) with interest to the respondent and that upon a full refund of the said sum of RM565,686.44 and payment of interest, ownership of the said portion of land shall revert to the appellant.

[11] The learned JC did not order any payment for loss of income to the respondent on the ground that the respondent had failed to adduce evidence to show and/or prove the loss/damage nor the amount of the loss/damage suffered by the respondent.

APPEAL BY THE APPELLANT/DEFENDANT

[12] Being dissatisfied with the decision of the learned JC, the appellant appealed to the Court of Appeal against the whole of the decision.

DECISION OF THE COURT OF APPEAL

[13] Upon reading the record of appeal, the written submissions of counsel for the appellant and the respondent and upon hearing counsel aforesaid, the court unanimously allowed the appeal and set aside the order of the High Court. The sum of RM565,686.44 which was paid into court by the appellant was ordered to be returned to the appellant together with interest, as the same had been placed in an interest bearing account.

[14] The respondent being dissatisfied with the decision of this court now applies for leave to appeal to the Federal Court.

GROUNDS OF DECISION

[15] It was not disputed by the parties that the crucial issue for determination by the trial court was whether vacant possession of the whole of the estate had been handed over to the respondent on 9 October 2004. The claim for specific performance and for loss and damage would only arise if the

decision was in favour of the respondent, otherwise all other issues before the learned JC would be rendered academic.

[16] Now that this court has set aside the order of the trial court, all of the issues, apart from the issue of vacant possession of the said portion of land, have indeed become academic.

[17] It will be timely to note at this juncture that the respondent's main claim was for the specific performance of delivery of vacant possession of the said portion of land alleged to be illegally occupied. There was no claim based on a rescission or termination of the SPA and particularly, there was no plea made by the respondent for a refund of the value of the said portion of land at RM565,686.44 or that upon a refund of the said sum by the appellant, ownership of the said portion of land (51.37 acres) shall revert to the appellant. It is trite that the court cannot entertain or grant any relief not prayed for by the respondent. Accordingly, in *Superintendent of Lands and Surveys Department Bintulu Division & Anor v Agi ak Bungkong & Ors* [2012] 1 MLJ 335, where the trial court went beyond what was claimed in the statement of claim, His Lordship Abu Samah JCA held, in delivering the judgment of the Court of Appeal, that such judgment is contrary to pleading, untenable in law and liable to be set aside. Further, in the recent case of *Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals* [2013] 2 MLJ 174, His Lordship Jeffrey Tan FCJ delivering the judgment of the Court of Appeal held that the relief claimed must surface from the pleaded facts that is, 'there must be an inner connection, a legal nexus, between the facts relied on and the relief or remedy claimed'. It was also held by Buttrose J in *Seven Seas Supply Co v Rajoo* [1966] 1 MLJ 71 that 'it is a well established principle of law that a case must be decided on issues raised by the pleadings which bind the parties. If other issues are desired to be raised or come to light during the trial they must be pleaded by way of amendment'.

[18] This court decided to set aside the order of the learned JC primarily on the first ground of appeal by the appellant that is, the court had no jurisdiction or power to order the said portion of land to be severed from the rest of the estate and to have ownership thereof revert to the appellant upon the appellant refunding the sum of RM565,686.44, being the value of the said portion of land, to the respondent. It is an undisputed fact that the entire estate is comprised under one issue document of title and there is no provision for the estate to be severed and subdivided and for ownership of the said portion of land to be reverted to the appellant. Moreover, the claim for severance, subdivision and reversion was never pleaded and prayed for by the respondent in the first place. It would appear that the learned JC failed to appreciate that the SPA was in respect of the entire estate and that there was no provision in the SPA to cater for a situation such as this by way of severance and subdivision. It

was not just a matter of the costs of the application for subdivision, as contended by counsel for the respondent, that was in issue. In any event, even in the order of the learned JC, no order for subdivision was made and no directions given as to how the subdivision and reversion were to take place to give effect to the order of the court. The court has to be mindful of the terms and conditions embodied in the SPA and the intentions of the parties and it is not for the court to attempt to rewrite the terms and conditions of the SPA for the parties. It will be useful to bear in mind what the Court of Appeal said in the case of *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22 where His Lordship Raus Sharif JCA (as he then was) delivering the judgment of the court held:

> It is trite law that the court should not rewrite the terms of the contract between the parties that it deems to be fair or equitable. This principle has been clearly expressed in numerous cases (see *Shell Malaysia Trading Sdn Bhd v Lim Yee Teck & Ors* [1982] 1 LNS 11; *Wong Pa Hock v American International Assurance Co Ltd & Anor* [2002] 2 CLJ 267; *M Pakiam v YP Devathanjam* [1952] MLJ 58; and *Charter Reinsurance Co Ltd v Fagai* [1996] 3 All ER 46.

[19] Further and in any event, this court held that vacant possession of the whole estate had in fact and in law been handed over by the appellant to the respondent on 9 October 2004. The decision of the learned JC that vacant possession of the said portion of land had not been delivered to the respondent went against the weight of the evidence. For reasons to be discussed below, the court is of the view that there were manifest errors of fact and law in the decision of the trial court:

(a) the problem of illegal occupiers on the said portion of land was a known problem stretching from since 1995/1996. The appellant had endeavoured to solve the problem and had in fact commenced legal action against the illegal occupiers. The appellant had obtained an order of writ of possession under O 89 of the Rules of the High Court 1980 sometime in 2003. Following this, the case against the illegal occupiers was settled with the appellant paying compensation to 13 occupiers in March 2004, as stated in evidence by Abdul Rauf bin Baba ('DW1'), the manager of the appellant, resulting in all the houses on the said portion of land being demolished;

(b) the presence of the illegal occupiers and the resolution of the problem had been made known by Dato Loo Pang Kee ('DW3') the managing director of the appellant, to the respondent. At the very least, DW3 had informed the respondent about the presence of the illegal occupiers prior to the execution of the SPA;

(c) by reason of cl 18 of the SPA, the respondent is deemed to have inspected the estate before the same was delivered on 9 October 2004. With this

deeming provision and in the absence of any complaint about the illegal occupiers, the respondent will be estopped from contending that vacant possession of the entire estate was not delivered to them on 9 October 2004.

Clause 18 of the SPA clearly provided as follows:

> 18. INSPECTION OF SAID LAND
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> The purchaser shall be deemed to have inspected the said Land and shall not be entitled to make any requisition nor any objection to the state and nature of the said Land. The Vendor shall however deliver vacant possession of the said Land together with the oil palm trees remaining intact.

From the facts of the case and evidence adduced in court, it is apparent that there was no physical inspection of the estate carried out by the respondent before vacant possession was delivered.

The delivery of vacant possession of the sstate took place at 12pm on 9 October 2004. What is materially significant is that the respondent is deemed to have inspected the estate as at 9 October 2004 by virtue of cl 18. As there was no protestation received from the respondent, it would not have been unreasonable to conclude that the respondent was satisfied with the delivery of vacant possession of the entire estate on 9 October 2004 with 'the oil palm trees remaining intact'. Counsel for the respondent had contended that it would have been impossible to identify the illegal occupiers from the appellant's workers. The court is of the view that this is but a lame excuse that goes to prove that the respondent had taken no steps to satisfy themselves on the issue of vacant possession before 9 October 2004. All that was required, was a physical check on the ground confined to the said portion of land which measured 51.37 acres only and not necessarily of the rest of the estate;

(d) in the present case, the complaint by the respondent is not so much of the continued existence of the illegal occupiers on the said portion of land but rather that there were thefts of the oil palm fruits committed and that the respondent was prevented from harvesting the oil palm fruits in the said portion of land;

(e) if the respondent did not inspect the said portion of land before 9 October 2004, they most certainly ran the risk of not knowing whether there was any illegal occupier on the land. They did so at their own peril and cannot now be heard to complain that vacant possession of the said portion of land was not delivered to them;

(f) in *Halsbury's Laws of England* (3rd Ed), Vol 34 at p 212 on the inspection of the property which a purchaser is proposing to purchase, it is stated:

> the rule is caveat emptor; a purchaser should make inspection and inquiry as to that which he is proposing to buy. If he omits to ascertain whether the land is such as he desires to acquire, he cannot complain afterwards on discovering

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> defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition; and, although as a general rule a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars or description of the property in the contract is not a ground of objection if it is readily corrected on inspection.

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(g) Lasim bin Abdul Latif ('PW4') in his evidence stated that the illegal occupiers were no longer staying on the said portion of land but on the adjoining land. The learned JC in his judgment accepted the evidence of PW4 and went on to hold that 'even though there may not be any illegal occupiers staying on the said land, but they are staying on the land which *adjoins* the said land …'. This finding by the learned JC clearly demonstrates that there was no longer any illegal occupiers *staying* on the said portion of land. But what is apparent is that the illegal occupiers who were *staying* on the adjoining land had obviously trespassed or intruded into the said portion of land to steal the oil palm fruits while at the same time obstructing or preventing the respondent from harvesting the fruits from the trees planted on the said portion of land;

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(h) the court agrees with counsel for the appellant that a distinction must be made between illegal occupiers staying on or occupying the land and person or persons trespassing onto the land to steal the oil palm fruits. In the latter case, the person or persons are not illegal occupiers of the said portion of land but are mere common thieves. The appellant's obligation was to deliver vacant possession of the estate which meant that the land must not just 'be empty and unoccupied but that the land must be capable of occupation by a purchaser' (see *Topfell Ltd v Galley Properties Ltd* [1979] 1 WLR 446). However, the court is of the view that the appellant's obligation does not extend to guaranteeing the respondent that there would not be any thefts of its oil palm fruits by anyone. It would be wrong for the court to equate the thieves with being illegal occupiers of the said portion of the land. In the present case, as there was no longer any illegal occupiers staving on the said portion of land, as held by the learned JC, the said portion of land was thus not only empty and unoccupied, but also capable of occupation by the respondent. All that was required of the respondent to occupy the said portion of land was to station sufficient personnel/staff thereon to maintain its physical presence as the new owner;

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(i) from the evidence and as discussed earlier, the court is satisfied that the respondent was informed by DW3 that the issue of illegal occupiers had been resolved by the appellant about two months prior to the execution of the SPA. In his grounds of judgment the learned JC accepted that the appellant had paid compensation to the 13 illegal occupiers and that all the houses on the said portion of land had been demolished;

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(j) one of the grounds relied on by the learned JC to hold that the appellant

had failed to deliver vacant possession of the entire estate was the fact that a police report was lodged by Lim Kee Fah, the appellant's manager on 11 August 2004 about 26 days *after* the SPA was signed, complaining that 'the illegal occupiers were still stealing oil palm fruits and trespassing despite being compensated'. With respect, the learned JC failed to appreciate that the lodging of the police report only indicated that there was still ongoing instances of theft, not that the illegal occupiers were still *staying* on the said portion of land; and

(k) the court notes with concern the delay on the part of the respondent in notifying the appellant in writing of the alleged presence of the illegal occupiers. The respondent's solicitors wrote to the appellant only on 16 August 2005 some ten months after delivery of vacant possession on 9 October 2004 alleging that vacant possession of the estate was not fully handed over and it was another 2 1/2 months later that the respondent's solicitors issued a letter of demand to the appellant. If, as the respondent contends, that there were illegal occupiers *staying* on the land as at 9 October 2004 or at the latest a couple of months thereafter, (and not about one month after 9 October 2004 as found by the learned JC) when the respondent was prevented from harvesting the oil palm fruits, it would have been incumbent on the respondent to inform the appellant of the problem soonest possible. As the complaint was not made until some ten months after 9 October 2004, it may not be unreasonable to conclude that the illegal occupiers (if that was actually who they were) may have returned and occupied the said portion of land after the respondent had purchased the same.

No doubt a police report was lodged by Ching Yee Chung, the cadet assistant manager of the respondent on 5 November 2004 but here again, the complaint in the report was about the theft of the oil palm fruits and not about the illegal occupation of the said portion of land.

CONCLUSION

[20] This court held that the appellant had, as a matter of fact and law delivered vacant possession of the estate, including the said portion of land, fully to the respondent on 9 October 2004. As such, there was no issue of whether an order of specific performance, which in any event is an equitable remedy, ought to have been granted to the respondent.

[21] As the court held that the appellant was not liable for any breach of the SPA, the other claims by the respondent for loss and damage did not arise and became academic.

[22] The order of the High Court providing for the appellant to refund the purchase price of the said portion of land to the respondent and for the respondent to revert ownership of the 51.37 acres of the estate to the appellant was accordingly set aside.

[23] In the result, the appellant's appeal was allowed with costs of RM30,000 here and below.

Appeal allowed with costs of RM30,000.

Reported by Afiq Mohamad Noor